IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| JAMES P. CHASSE, JR., et al., Plaintiffs, v. CHRISTOPHER HUMPHREYS, et al., Defendants. | No. CV-07-189-HU<br>OPINION & ORDER |

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HUBEL, Magistrate Judge:

Plaintiffs in this case bring civil rights and other claims against the City of Portland, two individual Portland Police Bureau (PPB) officers, unnamed City of Portland firefighters/paramedics, Multnomah County, an individual Multnomah County Sheriff's Deputy, Tri-Met, and American Medical Response (AMR) Northwest, Inc. The action arises out of the death of plaintiff James P. Chasse, Jr. on September 17, 2006, while in-custody of the PPB.

Presently, eight separate media organizations collectively move to intervene in the action in opposition to a protective order sought by the City defendants. I grant the motion for permissive intervention, decline to resolve the motion for intervention as of

right, and reject the media organizations' arguments in opposition to the protective order.

BACKGROUND

In July and August of 2007, plaintiff and defendants filed several discovery motions, including separate motions for protective order filed by the City defendants, the County defendants, and AMR Northwest. In an August 22, 2007 Order (dkt #92), I set oral argument on these motions for October 11, 2007.

On October 10, 2007, the media organizations filed the motion to intervene in order to oppose the City defendants' motion for protective order. Given the late filing of the motion to intervene, and my reluctance to alter the previously-scheduled argument on the discovery motions, I heard oral argument on the discovery motions, including the motions for protective order, on October 11, 2007, as scheduled.

I issued an Opinion & Order on the motions for protective order on October 23, 2007, granting the City's motion in large part. That same day, the City defendants filed a response to the motion to intervene. While the response is docketed after the Opinion & Order, the content of the response indicates that it was drafted, and perhaps filed, before the City defendants had seen the Opinion & Order on the protective order motion. The media organizations filed a reply in support of the motion to intervene, on November 2, 2007, after the October 23, 2007 Opinion & Order.

DISCUSSION

I. Intervention

The media organizations seek to intervene as of right under Federal Rule of Civil Procedure 24(a), and alternatively,

permissively under Rule 24(b). While the City defendants oppose intervention as of right, they concede that the Ninth Circuit, presented with the same issue, has approved of permissive intervention as a method for challenging a protective order. San Jose Mercury News, Inc. v. United States Dist. Ct., 187 F.3d 1096, 1100 (9th Cir. 1999) (stating that "[n]onparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention under Rule 24(b)(2)"). Given the controlling Ninth Circuit law and the City defendants' concession, I grant the motion for permissive intervention and decline to reach the issue of intervention as of right.

II. Protective Order

The Protective Order and Amended Protective Order[1], govern the production of eight categories of documents. The media organizations direct their argument in opposition to three of those categories: (1) PPB Internal Affairs Division (IAD) documents; (2) discipline files of Humphreys and Nice; and (3) the PPB's After-Action Report and Review Level Findings. The media organizations also oppose the imposition of a protective order on any documents from the City Auditor's Independent Police Review (IPR) Division.[2]

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[1] The Amended Protective Order made no substantive changes to the initial Protective Order but simply added language regarding the handling of documents produced under the Protective Order, at the conclusion of the case.

[2] As of this writing, the IPR documents are not covered by the Amended Protective Order. In the October 23, 2007 Opinion & Order, I explained that the record before me was inadequate to determine whether the IPR documents should be subject to the Protective Order. I ordered the City defendants to produce those

The media organizations initially argue that because the records at issue are defined as public records under Oregon's Public Records Law, Oregon Revised Statutes §§ (O.R.S.) 192.410-192.505, and are not subject to any exemption, they should not be covered by the Protective Order. Generally, in their briefing, the media organizations discuss the "disclosure is the rule" premise of the Public Records Law, the statutory right of inspection, and the narrow construction of exemptions to public disclosure. Intervenors' Memo. at pp. 5-7. They contend that none of the statutory exemptions permit withholding the documents at issue here, from public disclosure. Id. at pp. 6-10.

These arguments miss the mark as the issue before this Court is not the construction of Oregon's Public Records Law in the context of a public records request. At oral argument, the City defendants took the position, and the media organization intervenors agreed, that this Court has no jurisdiction over a state law public records request. I agree and expressly state that this Court has no such jurisdiction. Moreover, as I stated at the hearing, even if the Court had discretionary jurisdiction, I would decline to exercise it over that issue.

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documents in camera, which the City defendants have now done. They are currently under review. I did note, however, in the October 23, 2007 Opinion & Order, that to the extent the IPR files contained personal information regarding Humphreys and Nice, the files would likely be subject to the Protective Order. Oct. 23, 2007 Op. & Ord. at p. 7. I also said that if the IPR's function included investigating complaints in addition to gathering information, the IPR files would likely be subject to the protective order like the IAD files. Nonetheless, presently, the question of whether the IPR documents will be produced subject to the Amended Protective Order is under advisement.

However, as I also made clear at the oral argument, I intend no part of my decision regarding the Protective Order, to have any impact on, or to bind, any decisionmaker appropriately presented with a public records request. My decision is made solely in the context of the Federal Rules of Civil Procedure, specifically, Rule 26(c), and the caselaw interpreting that rule. While a decisionmaker presented with a public records request regarding the public records at issue in this motion, is welcome to any information or analysis in this Court's record if it is of any assistance, such decisionmaker is not bound by my decision, nor need defer to it in any way.

The media organizations next focus on the "good cause" standard under Rule 26(c). In the October 23, 2007 Opinion & Order, I explained the standards for assessing good cause under Rule 26(c). Oct. 23, 2007 Op. & Ord. at pp. 2-4. In particular, I noted that the burden for establishing the need for a protective order under Rule 26(c) falls on the party seeking it, and that the party must articulate specific facts showing that specific prejudice or harm will result if no protective order is granted. Id. at pp. 2-3 (quoting Marbet v. City of Portland, No. CV-02-1448-HA, 2003 WL 23540258, at *1, 3 (D. Or. Sept. 8, 2003), and Fischer v. City of Portland, No. CV-02-1728-BR, 2003 WL 23537981, at *2 (D. Or. Aug. 22, 2003)).

I also noted that generally, pretrial discovery, in the absence of a court order, is presumptively public, and that access to such discovery is "'"particularly appropriate when the subject matter of the litigation is of especial public interest[.]"'" Id. at p. 3 (quoting Marbet, 2003 WL 23540258, at *1 (quoting Welsh v.

City & County of San Francisco, 887 F. Supp. 1293, 1297 (N.D. Cal. 1995))).

I further noted, however, that despite the public presumption, the Supreme Court has instructed that discovery "'may seriously implicate privacy interests of litigants and third parties," and that discovery rarely takes place in public because pretrial discovery generally is not a "public component[] of a civil trial.'" Id. at p. 4 (quoting Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 & n.19, 34 (1984)).

Following the explanation and recitation of the appropriate standards, I concluded that the City defendants had met the good cause standard for protecting eight categories of documents. As to the IAD documents and the personnel/discipline files of Humphreys and Nice, I explained that these documents should be protected because the articulated facts showed that Humphreys and Nice had specific concerns about their personal safety should the documents be publicly released.

Humphreys had previously been stalked by an armed individual resulting from his duties as a law enforcement officer and while that incident occurred before the Chasse incident, other threatening activities had been directed to him, and Nice, arising directly from the Chasse incident.

I concluded that the City defendants' argument that public distribution of IAD and discipline materials concerning these officers, could impair their safety and that of their families, was not presented as a hypothetical fear. Oct. 23, 2007 Op. & Ord. at p. 6. The articulated specific facts of past actions suggest certain people in the community desire to cause the officers harm.

Id.; see also id. at 8 (applying same argument to discipline information from personnel files).

As to the After Action Report and Review Level documents, I agreed with the City defendants that generally, public dissemination of these types of documents would likely have a chilling effect on the free flow of advice and self-critical observations. Id. at p. 11. While this argument is, perhaps, nonspecific, I further noted that the fact that the After Action Report was not yet complete and the Review Level process was ongoing, created a concern that public dissemination of the documents I ordered to be immediately produced, could interrupt the continuing investigation, and could impair the remaining discussion and investigation of the incident. Id. at p. 12. I also noted that some of the After Action Report and Review Level documents were similar to those produced in response to the IAD document request and for the specific safety concerns discussed in connection with those documents, a protective order was similarly appropriate for the Review Level and After Action Report documents. Id.

The media organizations contend that I erred in concluding that the City defendants established good cause and that I failed to adequately weigh the legitimate public interest in the disclosure of these documents.

The media organizations first suggest that the proper good cause inquiry involves a two-step analysis. They rely on a 2002 Ninth Circuit case in which the court explained that for good cause to exist under Rule 26(c), the party seeking protection bears the burden of showing specific prejudice or harm will result if no

protective order is granted, and, "[i]f a court finds particularized harm will result from disclosure of information to the public, then it balances the public and private interests to decide whether a protective order is necessary." Phillips ex rel. Estate of Byrd v. General Motors Corp., 307 F.3d 1206, 1211 (9th Cir. 2002).

Notably, the case cited by Phillips in support of this second-step analysis, is a Third Circuit case which does not set out the good cause standard as a two-step inquiry. In Glenmede Trust Co. v. Thompson, 56 F.3d 476 (3d Cir. 1995), the court cited seven relevant factors, "neither mandatory nor exhaustive," that may be considered in evaluating whether good cause exists. Id. at 483. After reciting the seven factors, the Glenmede court then explained that "[a]lthough we have recognized that the district court is best situated to determine what factors are relevant to the dispute, we have cautioned that the analysis should always reflect a balancing of private versus public interests-[d]iscretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases." Id. (internal quotation omitted). The court went on to explain that "[b]y focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of confidentiality orders and the unnecessary denial of confidentiality for the information that deserves it[.]" Id. (internal quotation and brackets omitted)

The leading"good cause" case in the Ninth Circuit is Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003). Foltz, in discussing the standard for establishing good

cause under Rule 26(c) for unfiled discovery materials, makes no mention of a two-part test, despite quoting Phillips for the proposition that the district court must identify and discuss the factors it considers in a good cause analysis. Id. at 1130-31.

Continued discussion of this issue by the Foltz court emphasized the showing of specific harm or prejudice, or lack thereof, with no mention of a separate inquiry into balancing of public and private interests. Perhaps this is because in Foltz, there was no showing of specific harm and thus, the court did not need to address the second stage of the inquiry, if indeed the inquiry comprises two separate questions.

Nonetheless, at the conclusion of its discussion, the Foltz court noted that, upon remand, the district court had to require State Farm to make an actual showing of good cause for the continuing protection of the documents at issue. Id. at 1131. It cited to Phillips with a parenthetical explanation that the court in Phillips remanded to the district court with instructions to conduct a "good cause" analysis. Id. It cited to Deford v. Schmid Products Co., 120 F.R.D. 648, 653 (D. Md. 1987), with a parenthetical quote that "[t]he burden is on the party requesting a protective order to demonstrate that (1) the material in question is a trade secret or other confidential information within the scope of Rule 26(c), and (2) disclosure would cause an identifiable, significant harm." Id. Again, the court made no mention of a separate, second step of the good cause analysis.

That is not to say, however, that the balancing of the public interest against that of the individual litigant is irrelevant to the good cause determination. It is a relevant factor, just not a

separately articulated second step of the analysis. As a more recent Ninth Circuit case explained, "[t]he relevant standard for purposes of Rule 26(c) is whether "'"good cause" exists to protect the information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality.'" Pintos v. Pacific Creditors Ass'n, Nos. 04-17485, 04-17558, 2007 WL 2743502, at *5 (9th Cir. Sept. 21, 2007) (quoting Phillips, 307 F.3d at 1213).

Having considered the media organizations' arguments in opposition to the Protective Order, I remain convinced that the City defendants have established good cause for the Protective Order and therefore, I leave it in place. The City defendants have articulated, and I have found, that there are safety concerns which are best addressed with a protective order through the discovery phase of this case, and on the terms as outlined in the Protective Order and Amended Protective Order.[3]

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[3] During oral argument, the media organizations suggested that Humphreys's affidavit in support of the City defendants' protective order did not establish good cause because it did not expressly raise a safety issue as to IAD documents, IPR documents, personnel discipline files, or the After Action Report and Review Level documents. I reject this argument.

Reading the affidavit as a whole provides the requisite articulable facts creating a specific fear of harm. Humphreys notes that the posting of his address on a website has caused him concern for the safety of his family, that he has seen posters calling him a murderer as a result of the Chasse incident, that he has serious concerns about the unrestricted dissemination of personnel and personal information, that dissemination of his records may cause risk to his work as an undercover officer and place him in physical jeopardy, and that he has previously been caused severe distress by an armed stalker. Humphreys Affid. at ¶¶ 4-11. Given these statements, it was not necessary for Humphreys to expressly state that release of IAD files, personnel documents, IPR documents, or the After Action Report and Review

While I believe that I adequately noted the public interest in the October 23, 2007 Opinion & Order, I explain again here, more expressly, why I strike the balance in favor of protecting these documents, through the discovery phase.

Public dissemination, during the discovery phase of the case, of the documents regarding the past conduct of Humphreys and Nice, before the Chasse incident, could foster a public conversation regarding what should have been done as to PPB training or discipline, which in turn may provoke a discussion about changes to training or discipline policies. However, when comparing this interest to the safety concerns of the individual officers, and the right to a fair trial guaranteed to all defendants, the defendants' concerns carry more weight.

In my opinion, the most appropriate avenue for any change to PPB policy, if any is warranted, is the prosecution of the claims, especially the Monell claims, by plaintiffs in the context of this litigation. Also notable is the fact that the media organizations may obtain the documents at issue by pursuing a public records request. Any public interest in knowing the content of these documents, which in turn may be the basis for public discussion of issues regarding monitoring PPB policies and advocating for change, is outweighed by the safety and fair trial concerns of the defendants, by the fact that the intervenors have an alternative avenue to obtain the documents, and by the fact the Protective Order governs the production of documents only through the

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Level documents creates a safety issue. That much is obvious to anyone reading his affidavit.

discovery phase of this case.

As far as the documents related to the ongoing investigation of the Chasse incident, that is, the After Action Report and Review Level documents, the public interest articulated above is equally applicable to these documents. It is outweighed, however, by my concerns, discussed in the October 23, 2007 Opinion & Order, regarding public dissemination of documents generated during an investigation which is not yet complete, and by the safety concerns for the individual officers which may be implicated by the contents of some of those documents. And, as with the other documents, the media organizations may request that the City defendants produce the After Action Report and Review Level documents under the Public Records Law.

Finally, while cases relied on by the media organizations, such as Bond v. Utreras, No. 04 C 2617, 2007 WL 2003085 (N.D. Ill. July 2, 2007), Welsh v. City & County of San Francisco, 887 F. Supp. 1293 (N.D. Cal. 1995), and Judge Haggerty's recent opinion in Gwerder v. Besner, No. CV-07-335-HA, Opinion & Order (D. Or. Oct. 5, 2007), stress the public character of some of the types of documents at issue here and the public's right to know how allegations of misconduct are being handled and investigated, which in turn gives the public information enabling it to "supervise" and monitor the conduct of police officers, none of these cases appears to discuss facts similar to those presented here, namely, the repeated accusation that the individual officers are murderers, accompanied by "wanted" style posters, coupled with a prior stalking incident as to one officer and the appearance of that officer's address on the internet, and the fact that some of the

documents are part of an ongoing and incomplete investigation.

When "focusing on the particular circumstances in the case[] before [me]," it is those specific facts that distinguish this case from others which have considered similar types of documents and the propriety of subjecting them to a protective order. For the reasons articulated in my October 23, 2007 Opinion & Order, and in this Opinion & Order, I adhere to my prior conclusion and uphold the Protective Order and the Amended Protective Order entered in this case.

## CONCLUSION

I reject the media intervenors' arguments in opposition to the Protective Order and Amended Protective Order.

IT IS SO ORDERED.

Dated this 19th day of November, 2007.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge